

Study L-4004

November 28, 2000

Memorandum 2000-86**Health Care Decisions Law: Technical Revisions
(Draft Tentative Recommendation)**

At the last meeting, the Commission decided to consider some minor substantive and technical revisions in the Health Care Decisions Law. A staff draft tentative recommendation implementing the Commission's decisions is attached.

Some additional issues are raised in Staff Notes following the relevant sections in the draft.

Respectfully submitted,

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HEALTH CARE DECISIONS LAW: TECHNICAL REVISIONS

The Health Care Decisions Law was enacted in 1999 on recommendation of the Law Revision Commission.¹ As health care institutions and professional groups have begun to study and implement the new law, the Commission has learned of several problems that need further attention. This recommendation proposes a number of minor substantive and technical revisions as a follow-up to the 1999 legislation.

Definition of Capacity

Capacity is a fluid concept. Its meaning varies depending on the circumstances and the nature of the action an individual wishes to take. In the Power of Attorney Law, which included the durable power of attorney for health care, the Commission did not attempt to flesh out the meaning of capacity, but adopted the general rule that a “natural person having the capacity to contract may execute a power of attorney.”²

In the new Health Care Decisions Law, the Commission included a definition of capacity based on Health and Safety Code Section 1418.8 and the Uniform Health-Care Decisions Law of 1993. The new definition is specifically crafted to apply in the health care decisionmaking context: “‘Capacity’ means a patient’s ability to understand the nature and consequences of proposed health care, including its significant benefits, risks, and alternatives, and to make and communicate a health care decision.”³

A technical problem has been noted in the application of this definition where there is no “proposed health care” at the time the individual’s capacity is relevant. This would commonly be the situation where a person is filling out an advance health care directive to appoint a health care agent or to give future health care instructions.⁴ The “capacity” definition can still work in these cases, because the other prong of the test would apply — the “ability to make and communicate a

1. 1999 Cal. Stat. ch. 658 (AB 891, Alquist) (operative July 1, 2000). For the Commission’s original recommendation, see *Health Care Decisions for Adults Without Decisionmaking Capacity*, 29 Cal. L. Revision Comm’n Reports 1 (1999). The law as enacted, with revised Comments, is included in *2000 Health Care Decisions Law and Revised Power of Attorney Law*, 30 Cal. L. Revision Comm’n Reports 1 (2000).

2. Prob. Code § 4120 & Comment. This is consistent with the general agency rule in Civil Code Section 2296. See also Civ. Code § 1556 (“All persons are capable of contracting, except minors, persons of unsound mind, and persons deprived of civil rights.”).

Unless otherwise indicated, all further statutory references are to the Probate Code.

3. Section 4609.

4. See Sections 4605 (“advance health care directive” defined), 4607 (“agent” defined), 4623 (“individual health care instruction” defined), 4629 (“power of attorney for health care” defined), 4670 *et seq.* (provisions governing advance health care directives).

1 health care decision.”⁵ It would be better, of course, if the statute were not phrased
2 in a way that might cause confusion or mislead.

3 Accordingly, the Commission recommends splitting the definition of capacity
4 into two parts, one applicable to the capacity to make health care decisions and the
5 other applicable to execution of advance directives. The existing definition should
6 continue to apply to making health care decisions. A general contract standard
7 should apply to execution of advance directives, based on the individual’s ability
8 to understand the nature and consequences of the action.⁶ In effect, this would
9 return the law concerning capacity to execute a power of attorney for health care to
10 the rule in effect under the Power of Attorney Law.⁷ In addition, the contract
11 standard would be applied to selecting or disqualifying a surrogate.⁸

12 **Patient’s Designation of Surrogate**

13 The Health Care Decisions Law includes provisions recognizing the patient’s
14 right to designate a “surrogate” by personally informing the supervising health
15 care provider, orally or in writing.⁹ While designation of an agent under a power
16 of attorney for health care is preferred, recognition of the clinical reality of
17 surrogate designations affirms the fundamental principle of patient autonomy. Due
18 to concerns about the possibility of giving effect to obsolete oral statements in the
19 patient’s record, the effectiveness of oral surrogate designations under Section
20 4711 was limited to the “course of treatment or illness or during the stay in the
21 health care institution when the designation is made.”¹⁰ A surrogate designation
22 communicated to the supervising health care provider in writing would not be
23 subject to this limitation.

24 Two concerns have arisen in applying Section 4711: (1) The default rule that a
25 surrogate designation, whether oral or written, would act as a revocation of the
26 appointment of an agent under a power of attorney for health care¹¹ is too harsh

5. Definitions in the Health Care Decisions Law govern its construction “unless the context otherwise requires.” See Section 4603.

6. See proposed amendment to Section 4609 *infra*.

7. See, e.g., *Hellman Commercial Trust & Sav. Bank v. Alden*, 206 Cal. 592, 603, 275 P. 974 (1929) (discussing “nature, purposes, and effect” of the action); *Burgess v. Security-First Nat’l Bank*, 44 Cal. App. 2d 808, 816, 113 P.2d 298 (1941). The specialized rules for determining capacity under the Due Process in Competence Determinations Act (Sections 810-813) are applicable in judicial determination. See Sections 811(e), 813.

8. See Section 4711. A “surrogate” is an adult, other than an agent or conservator, authorized to make health care decisions for the patient. See Section 4643.

9. Sections 4711-4715 & Comments.

10. See second sentence of Section 4711 & Comment.

11. The statute does not provide explicitly that the surrogate designation revokes the agent’s authority, but Uniform Health-Care Decisions Act comment incorporated as background in the Commission’s Comment to Section 4711 states that an “oral designation of a surrogate made by a patient directly to the supervising health-care provider revokes a previous designation of an agent.” The uniform act comment does not suggest the effect of a written surrogate designation, but there is no reason to think it would have a less significant effect than an oral communication to the supervising health care provider. See also Section 2(b) (provisions drawn from uniform acts to be construed to make law uniform in enacting states).

1 and may actually defeat the patient’s intent. (2) In the nursing home setting, the
2 limitation on the duration of oral surrogate designations to the “stay in the health
3 care institution” is not a meaningful limitation.

4 The Commission recommends amending Section 4711 to address these problems
5 and provide additional statutory guidance on surrogate designations:¹²

6 *(1) Relation of Surrogate Designation to Health Care Agent*

7 The presumption that a surrogate designation revokes the appointment of a
8 health care agent should be reversed. Designating a surrogate should act as a
9 revocation of the agency only if the patient expresses that intention in compliance
10 with the general rule governing powers of attorney for health care.¹³ A patient may
11 want the surrogate to act in place of an agent named in a power of attorney for any
12 number of reasons, without intending to permanently replace the agent. The agent
13 may be unavailable because he or she is on a vacation or otherwise unavailable
14 when the patient is hospitalized. Or the named agent may be experiencing health
15 or personal problems that impel the patient to seek someone else as a temporary
16 surrogate.

17 *(2) Duration of Surrogate Designation in Nursing Home Setting*

18 In the long-term, custodial care setting, if there is a health care agency in force, a
19 surrogate designation should be effective for no more than 30 days, unless at the
20 end of that period the agent under the power of attorney for health care is not
21 reasonably available, in which case the surrogate designation remains effective
22 until the agent is ready to act. This rule preserves the authority of the formally
23 designated agent under a power of attorney for health care, but recognizes patient
24 autonomy and the potential need for a surrogate where the agent can’t act.

25 *(3) Duration of Surrogate Designation in Hospital Setting*

26 The existing general limitation on the duration of oral surrogacies should be
27 narrowed to apply in the acute care setting where there is no known agent under a
28 power of attorney for health care. In these situations, the surrogate designation
29 would be effective “during the course of treatment or illness or during the stay in
30 the health care institution,” as under existing law. In cases where there is no agent,
31 it would defeat the patient’s intent to preclude resort to a surrogate designated in a
32 prior hospital visit and entered in the patient’s record. It is unlikely that a patient
33 would think it was necessary to renew his or her surrogate designation every
34 hospital visit. While regular communication between patient and the supervising
35 health care provider is ideal, the statute should not defeat likely expectations
36 where the ideal is not met. There may also be situations where the patient is unable
37 to communicate any intention on a later hospitalization, and in such cases the
38 statute should not nullify the patient’s earlier surrogate designation noted in the
39 medical record.

12. See proposed amendment to Section 4711 *infra*.

13. See Section 4695(a),

1 (4) *Patient Control*

2 The statutory rules concerning the relation of surrogate designations to agent
3 designations, and the duration and conditions governing surrogates, should be
4 subject to control by the patient. If the patient wants the surrogate designation to
5 last longer than the statutory default period, the patient's intention, expressed to
6 the supervising health care provider and recorded in the patient's record, should
7 govern.

8 **Scope of Petition**

9 The Health Care Decisions Law, like its predecessor, provides an expeditious
10 procedure for obtaining judicial review in appropriate situations. The grounds for a
11 petition are broad, but not unlimited, and include determining (1) whether the
12 patient has capacity to make health care decisions, (2) whether an advance health
13 care directive is in effect, and (3) whether the acts or proposed acts of an agent or
14 surrogate (including a surrogate committee) are consistent with the patient's
15 desires as expressed in an advance health care directive or otherwise made known
16 to the court or, where the patient's desires are unknown or unclear, whether the
17 acts or proposed acts of the agent or surrogate are in the patient's best interest.

18 For the purpose of getting comments from interested persons, the Commission
19 tentatively proposes to permit a petition requiring third persons to honor the
20 agent's authority under the power of attorney for health care.¹⁴ This would include
21 health care decisions,¹⁵ as well as decisions concerning disposition under the
22 Uniform Anatomical Gift Act, authorizing an autopsy, and directing disposition of
23 remains,¹⁶ or making personal care decisions.¹⁷ The petition should also be
24 available to compel a third person to honor the authority of a surrogate, i.e., a
25 person (other than an agent or conservator) with the authority to make health care
26 decisions for an adult under the Health Care Decisions Law or other governing
27 principles.

28 **Supervising Health Care Provider as Agent**

29 The Health Care Decisions Law carried forward the limitations on who can be
30 designated as a health care agent and the exceptions to the limitations which were
31 enacted in the 1980s.¹⁸ Specifically, Section 4659 now provides that the patient's
32 supervising health care provider or an employee of the health care institution
33 cannot act as an agent or surrogate health care decisionmaker. However,
34 subdivision (b) of Section 4659 provides an exception to the limitation, which

14. See proposed amendment to Section 4766 *infra*.

15. See Section 4615 ("health care" defined).

16. See Section 4683 (scope of agent's authority). See also Sections 4678 (right to health care information), 4690 (agent's right of consultation and to receive information).

17. See Section 4671(b).

18. Section 4659 restates former Section 4702 (enacted as part of the Power of Attorney Law, 1994 Cal. Stat. ch. § 16), which continued former Civil Code Section 2432.5 (enacted by 1984 Cal. Stat. ch. 312, § 4).

1 permits employees who are related to the patient by blood, marriage, or adoption,
2 or who are employed by the same health care institution, to act as the patient's
3 health care agent. Thus, if a patient is employed by the same institution as his or
4 her doctor, or is related to the doctor and the doctor is an employee, the exception
5 to the statutory prohibition would seem to apply.

6 It does not appear that the statute ever intended to permit the treating physician
7 (included within the term "supervising health care provider") to serve as a health
8 care agent, but this construction is possible under a literal reading of the statute in
9 circumstances where the physician fell into the class of employees.

10 The proposed amendment makes clear that a supervising health care provider
11 cannot make decisions as a health care agent for his or her patient.¹⁹ Under this
12 rule, if a doctor wants to act as the agent for his or her spouse, the doctor would
13 have to decline to act as the supervising health care provider.

19. See proposed amendment to Section 4659 *infra*.

PROPOSED LAW

Prob. Code § 4123 (technical amendment). Permissible purposes of general power of attorney


SECTION 1. Section 4123 of the Probate Code is amended to read:

4123. (a) In a power of attorney under this division, a principal may grant authority to an attorney-in-fact to act on the principal's behalf with respect to all lawful subjects and purposes or with respect to one or more express subjects or purposes. The attorney-in-fact may be granted authority with regard to the principal's property, personal care, ~~health care~~, or any other matter.

(b) With regard to property matters, a power of attorney may grant authority to make decisions concerning all or part of the principal's real and personal property, whether owned by the principal at the time of the execution of the power of attorney or thereafter acquired or whether located in this state or elsewhere, without the need for a description of each item or parcel of property.

(c) With regard to personal care, a power of attorney may grant authority to make decisions relating to the personal care of the principal, including, but not limited to, determining where the principal will live, providing meals, hiring household employees, providing transportation, handling mail, and arranging recreation and entertainment.

Comment. Subdivision (a) of Section 4123 is amended to recognize the limitations on the scope of this division. Powers of attorney for health care are governed by the Health Care Decisions Law, Division 4.7 (commencing with Section 4600). This division — the Power of Attorney Law, Division 4.5 (commencing with Section 4000) — does not apply to power of attorney for health care. See Section 4050 (types of powers of attorney governed by this division).

 **Staff Note.** This technical correction was not considered by the Commission at the October meeting. The reference to health care in subdivision (a) should have been deleted in connection with AB 891 (1999), which implemented the Health Care Decisions Law.

Prob. Code § 4609 (amended). “Capacity”

SEC. 2. Section 4609 of the Probate Code is amended to read:

4609. “Capacity” (a) With respect to making health care decisions, “capacity” means a patient's ability to understand the nature and consequences of proposed health care, including its significant benefits, risks, and alternatives, and to make and communicate a health care decision.

(b) With respect to giving or revoking an advance health care directive or selecting or disqualifying a surrogate, “capacity” means the patient's ability to understand the nature and consequences of the action.

Comment. Subdivision (b) is added to Section 4609 to recognize a contract standard of capacity as applied to actions involving advance health care directives. Subdivision (b) is consistent with the rule formerly applicable to durable powers of attorney for health care under Section 4120 in the Power of Attorney Law.

1 For provisions relating to the capacity definition in subdivision (a), see Sections 4651
2 (authority of person having capacity not affected), 4658 (determination of capacity and other
3 medical conditions), 4682 (when agent's authority effective), 4683 (scope of agent's authority).

4 For provisions relating to the capacity definition in subdivision (b), see, e.g., Sections 4670
5 (authority to give individual health care instruction), 4671 (authority to execute power of attorney
6 for health care), 4695 (revocation of power of attorney for health care), 4715 (disqualification of
7 surrogate).

8 See also Sections 4657 (presumption of capacity), 4732 (duty of primary physician to record
9 relevant information), 4733 (obligations of health care provider), 4766 (petition as to durable
10 power of attorney for health care).

11 **Prob. Code § 4659 (technical amendment). Limitations on who may act as agent or**
12 **surrogate**

13 SEC. 3. Section 4659 of the Probate Code is amended to read:

14 4659. (a) Except as provided in subdivision (b), none of the following persons
15 may make health care decisions as an agent under a power of attorney for health
16 care or a surrogate under this division:

17 (1) The supervising health care provider or an employee of the health care
18 institution where the patient is receiving care.

19 (2) An operator or employee of a community care facility or residential care
20 facility where the patient is receiving care.

21 (b) The prohibition in subdivision (a) does not apply to the following persons:

22 (1) An employee (other than the supervising health care provider) who is related
23 to the patient by blood, marriage, or adoption.

24 (2) An employee (other than the supervising health care provider) who is
25 employed by the same health care institution, community care facility, or
26 residential care facility for the elderly as the patient.

27 (c) A conservator under the Lanterman-Petris-Short Act (Part 1 (commencing
28 with Section 5000) of Division 5 of the Welfare and Institutions Code) may not be
29 designated as an agent or surrogate to make health care decisions by the
30 conservatee, unless all of the following are satisfied:

31 (1) The advance health care directive is otherwise valid.

32 (2) The conservatee is represented by legal counsel.

33 (3) The lawyer representing the conservatee signs a certificate stating in
34 substance:

35 "I am a lawyer authorized to practice law in the state where this advance
36 health care directive was executed, and the principal or patient was my client
37 at the time this advance directive was executed. I have advised my client
38 concerning his or her rights in connection with this advance directive and the
39 applicable law and the consequences of signing or not signing this advance
40 directive, and my client, after being so advised, has executed this advance
41 directive."

42 **Comment.** Section 4659 is amended to clarify an ambiguity that existed in prior law. See
43 former Section 4702. As amended, the exception in subdivision (b) does not apply to supervising
44 health care providers. Consequently, the bar on supervising health care providers acting as agents
45 or surrogates provided in subdivision (a) is absolute. If a supervising health care provider is the

1 spouse of a patient, he or she would need to cease acting as the patient's primary physician or
2 other supervising health care provider in order to undertake responsibilities as an agent under a
3 power of attorney for health care or as a surrogate health care decisionmaker.

4 **Prob. Code § 4711 (amended). Patient's designation of surrogate**

5 SEC. 4. Section 4711 of the Probate Code is amended to read:

6 4711. (a) A patient may designate an adult as a surrogate to make health care
7 decisions by personally informing the supervising health care provider. ~~An oral~~
8 The designation of a surrogate shall be promptly recorded in the patient's health
9 care record and is effective.

10 (b) If the patient has designated an agent in a power of attorney for health care
11 and the existence of the power of attorney for health care is recorded in the
12 patient's health care record or otherwise known to the supervising health care
13 provider, the duration of a surrogate designation under this section is subject to the
14 following limitations, except as the patient otherwise informs the supervising
15 health care provider:

16 (1) In the case of a patient in custodial or long-term care in a skilled nursing
17 facility or other health care institution, the surrogate replaces the agent for 30 days
18 or until the agent is reasonably available and willing to make health care decisions
19 pursuant to Section 4685, whichever period is longer.

20 (2) In other cases, the surrogate replaces the agent only during the course of
21 treatment or illness or during the stay in the health care institution when the
22 surrogate designation is made.

23 (c) Designation of a surrogate under subdivision (a) does not revoke the
24 designation of an agent under a power of attorney for health care unless the patient
25 communicates the intention to revoke in compliance with subdivision (a) of
26 Section 4695.

27 **Comment.** Section 4711 is amended to clarify the relation between a surrogate designation
28 under this section and a formal agent designation in a power of attorney for health care under
29 Section 4671 and related provisions. Both the patient and the surrogate must be adults. See
30 Sections 4625 ("patient" defined), 4643 ("surrogate" defined). "Adult" includes an emancipated
31 minor. See Fam. Code § 7002 (emancipation). "Personally informing," as used in this section,
32 includes both oral and written communications.


33 Consistent with the statutory purpose of effectuating patient intent, subdivision (a) recognizes
34 the patient's ability to name a person to act as surrogate health care decisionmaker. As amended,
35 this section no longer distinguishes between surrogates named orally and surrogates named in a
36 written communication to the supervising health care provider. Whether it is communicated to the
37 supervising health care provider orally or in writing, the surrogate designation must be promptly
38 recorded in the patient's health care record. See also Section 4731 (supervising health care
39 provider's duty to record relevant information).

40 Subdivision (b) provides special limitations on the duration of surrogate designations where the
41 patient has designated an agent under a power of attorney for health care and that designation is in
42 the patient's record or otherwise known to the supervising health care provider. Subdivision
43 (b)(1) provides a new rule concerning the duration of a surrogate designation in situations
44 involving custodial or long-term care. In acute care settings, the duration of the surrogate
45 designation depends on the length of the patient's stay in the hospital or the patient's illness or
46 course of treatment, as provided in subdivision (b)(2). The default limitations on surrogate

designations are subject to the patient's expression of a different limitation, as recognized in the introductory paragraph of subdivision (b). Thus, for example, a patient in either a long-term or acute care setting may designate a surrogate to make decisions until the agent returns from an overseas trip or some other period depending on events. The default time limitations in subdivision (b) are not intended to override the patient's intent, as expressed to the supervising health care provider. The arbitrary 30-day period in subdivision (b)(1) and the limitations in subdivision (b)(2) are provided as general guidelines subject to the patient's control. Subdivision (b) applies only in cases where the patient has made a previous designation of an agent under a power of attorney for health care. If there is no agent, the time limitations are not applicable. If the patient names an agent in a power of attorney for health care executed after making a surrogate designation, the agent would have priority over the surrogate as provided in Section 4685 (agent's priority).

Subdivision (c) makes clear that the appointment of an agent under a power of attorney for health care is not revoked simply by the act of naming a surrogate under this section. Instead, the patient must express the intent to revoke the agent's appointment, under the terms of the general rule in Section 4695(a). Subdivision (c) reverses the former presumption that a surrogate designation made directly to the supervising health care provider revoked a previous designation of an agent. See Background from Uniform Act in Comment to Section 4711 as enacted, 1999 Cal. Stat. ch. 658, § 39 (operative July 1, 2000).

See also Sections 4617 ("health care decision" defined), 4619 ("health care institution" defined), 4635 ("reasonably available" defined), 4639 ("skilled nursing facility" defined), 4641 ("supervising health care provider" defined).

 **Staff Note.** This section addresses the major new matter discussed at the October meeting, concerning the appropriate duration of surrogate designations where a power of attorney for health care is in force. The staff is proposing a default 30-day rule in long-term care settings, but the statute retains the existing limitation for acute care settings. Some fine points bear further discussion, and as the drafting progressed, other issues were dealt with or ignored.

Oral surrogate rules. Existing law provides a duty to record *oral* surrogate designations, but this rule could be misleading as so limited because the supervising health care provider has a duty to record all surrogate designations, oral or written, under Section 4731(a). The oral surrogate language is an artifact of amendments made to answer concerns raised in legislative committee; expanding the explicit reference to this duty does not detract from the purpose of that change made in AB 891.

Similarly, the staff is proposing to generalize the acute care limitation (during the course of treatment or illness or stay in the hospital) in existing Section 4711, which applies only to *oral* surrogate designations. Thus, the draft revisions strike "oral" from the second sentence of the section, thereby eliminating any distinction between oral and written designations.

Application of time limits. Rather than making the oral-written distinction, the draft amendments makes distinctions based on whether there is a pre-existing power of attorney for health care. In the long-term care setting, the 30-day time limit in subdivision (b)(1) applies only if there is a power of attorney for health care. Moreover, the surrogate designation remains effective after 30 days until such time as the named agent is willing and able to act. This principle is a compromise between the patient's expressed desire for the surrogate to make decisions and the patient's earlier expression in the power of attorney for health care giving authority to the agent. If there is not readily available agent, then there is no reason to terminate the surrogate's authority.

Note, however, that the draft does not apply an agent-availability rule to the acute care institution rule in subdivision (b)(2). This preserves the earlier Commission policy against giving effect to obsolete oral statements (now broadened to include all communications) entered in the patient's record. This rule is also based on the assumption that such surrogate designations are intended to be transitory, "for this ride only." The Commission may want to reconsider this policy, however, since it would have the effect of nullifying a patient's unstated intention that the

designated surrogate should have authority indefinitely. In short, there is no evidence that this is a problem one way or the other, but the rule continued here was based on a general assumption focusing on reliability and durability of oral statements.

There is an escape hatch built into the draft — the introductory language in subdivision (b) recognizes that the limitations do not apply if the patient expresses a different intention to the supervising health care provider. This is intended to permit a patient to make clear that the surrogate has continuing authority, notwithstanding the default time limitations.

Revocation of agency. This duration exception overlaps to some extent with the purpose of subdivision (c), which reverses the interpretation given in the Uniform Act comment following Section 4711 in existing law to the effect that a surrogate delegation revokes appointment of an agent. Under the draft revisions of Section 4711, the patient is presumed not to revoke the agent's authority by naming a surrogate.

Power of attorney control. The section is silent on whether the power of attorney for health care itself could prevent designation of a surrogate or otherwise control who can be a surrogate or how long a surrogate designation lasts. The staff prefers to avoid drafting an entire Surrogate Code and thus would not try to answer all theoretical questions that could arise. In the clinical setting, the staff assumes this is extremely unlikely to arise. But even then, the policy of the Health Care Decisions Law is to determine and implement patient intent, and locking a patient's intent into a power of attorney for health care without the ability to override it is contrary to that policy. Section 4695 governing revocation of advance directives does not provide that revocation can be precluded or controlled by the language of the advance directive. The same is true for powers of attorney for property. See, e.g., Prob. Code § 4151.

Heading of Chapter 3 (commencing with Section 4765) (technical amendment)

SEC. 5. The heading of Chapter 3 (commencing with Section 4765) of Part 3 of Division 4.7 of the Probate Code is amended to read:

CHAPTER 3. PETITIONS, AND ORDERS, APPEALS

Comment. The chapter heading is amended to accurately reflect the contents of the chapter. Appeals under the Probate Code are governed generally by Part 3 (commencing with Section 1300) of Division 3. See Section 1302.5 (grounds for appeal under Health Care Decisions Law).

Prob. Code § 4766 (amended). Purposes of petition

SEC. 6. Section 4766 of the Probate Code is amended to read:

4766. A petition may be filed under this part for any one or more of the following purposes:

(a) Determining whether or not the patient has capacity to make health care decisions.

(b) Determining whether an advance health care directive is in effect or has terminated.

(c) Determining whether the acts or proposed acts of an agent or surrogate are consistent with the patient's desires as expressed in an advance health care directive or otherwise made known to the court or, where the patient's desires are unknown or unclear, whether the acts or proposed acts of the agent or surrogate are in the patient's best interest.

(d) Declaring that the authority of an agent or surrogate is terminated, upon a determination by the court that the agent or surrogate has made a health care

1 decision for the patient that authorized anything illegal or upon a determination by
2 the court of both of the following:

3 (1) The agent or surrogate has violated, has failed to perform, or is unfit to
4 perform, the duty under an advance health care directive to act consistent with the
5 patient's desires or, where the patient's desires are unknown or unclear, is acting
6 (by action or inaction) in a manner that is clearly contrary to the patient's best
7 interest.

8 (2) At the time of the determination by the court, the patient lacks the capacity to
9 execute or to revoke an advance health care directive or disqualify a surrogate.


10 (e) Compelling a third person to honor individual health care instructions or the
11 authority of an agent or surrogate.

12 **Comment.** Section 4766 is amended to add the grounds for a petition specified in subdivision
13 (e)/ This subdivision is consistent with the provision applicable to compel compliance with
14 powers of attorney for property matters in Section 4541(f). The remedy provided by this
15 subdivision would be appropriate where the third person has a duty to honor the authority of an
16 agent or surrogate. See, e.g., Sections 4685 (agent's priority), 4733 (duty of health care provider
17 or institution to comply with health care instructions and decisions).

18 The extent to which a third person may be compelled to comply with decisions of an agent or
19 surrogate is subject to other limitations in this division. See, e.g., Sections 4652 (excluded acts),
20 4653 (mercy killing, assisted suicide, euthanasia not approved), 4654 (compliance with generally
21 accepted health care standards), 4734 (right to decline for reasons of conscience or institutional
22 policy), 4735 (right to decline to provide ineffective care).

23 An advance health care directive may limit the authority to petition under this part. See
24 Sections 4752 (effect of provision in advance directive attempting to limit right to petition), 4753
25 (limitations on right to petition).

26 See also Sections 4605 ("advance health care directive" defined), 4607 ("agent" defined), 4609
27 ("capacity" defined), 4613 ("conservator" defined), 4623 ("individual health care instructions"
28 defined), 4629 ("power of attorney for health care" defined), 4633 ("principal" defined), 4643
29 ("surrogate" defined).

30  **Staff Note.** The Commission directed the staff to prepare draft amendments to permit
31 petitions requiring health care providers to honor the agent's health care decisions. The language
32 in subdivision (e) implements that intent in more general terms since there is no reason to limit it
33 to health care providers. Any person with a duty to honor the agent's (or surrogate's) authority
34 should be within the scope of this section.

35 If this approach is rejected in the final recommendation, Section 4769 (set out following)
36 should be amended to delete subdivision (b), which refers to a nonexistent ground for a petition
37 under this division.

38 The reference to health care instructions in subdivision (e) was not discussed at the October
39 meeting, but is needed for consistency with the sort of conforming revisions made throughout the
40 Health Care Decisions Law provisions that derive from the predecessor Power of Attorney Law.
41 There is no analogous creature in the property power of attorney to the "individual health care
42 instruction."

43 **Prob. Code § 4769 (amended). Notice of hearing**

44 SEC. 7. Section 4769 of the Probate Code is amended to read:

45 4769. (a) Subject to subdivision (b), at least 15 days before the time set for
46 hearing, the petitioner shall serve notice of the time and place of the hearing,
47 together with a copy of the petition, on the following:


1 (1) The agent or surrogate, if not the petitioner.

2 (2) The patient, if not the petitioner.

3 (b) In the case of a petition to compel a third person to honor individual health
4 care instructions or the authority of an agent or surrogate, notice of the time and
5 place of the hearing, together with a copy of the petition, shall be served on the
6 third person in the manner provided in Chapter 4 (commencing with Section
7 413.10) of Title 5 of Part 2 of the Code of Civil Procedure.

8 **Comment.** Subdivision (b) of Section 4769 is amended for consistency with Section 4766(e)
9 (petition to compel third person to honor health care instructions or authority of agent or
10 surrogate).

11 See also Sections 4607 (“agent” defined), 4623 (“individual health care instructions” defined),
12 4625 (“patient” defined), 4633 (“principal” defined), 4643 (“surrogate” defined).

13  **Staff Note.** The reference to health care instructions in subdivision (b) was not discussed at
14 the October meeting, but is needed for consistency with the sort of conforming revisions made
15 throughout the Health Care Decisions Law provisions that derive from the predecessor Power of
16 Attorney Law. There is no analogous creature in the property power of attorney to the “individual
17 health care instruction.”
